

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE DISTRICT ATTORNEY



George Gascón
District Attorney

CRISTINE SOTO DE BERRY
Chief of Staff

DIRECT DIAL: (415) 553-1747

E-MAIL: CRISTINE.DEBERRY@SFGOV.ORG

July 15, 2019

VIA ELECTRONIC MAIL

Dan Rubins
Muck Rock
76598-00420667@requests.muckrock.com

Re: Your Public Record Request received on 7/5/2019

Dear Mr. Rubins,

This letter is in response to your request for records under the California Public Records Act sent on 7/4/2019, an office holiday, and received on 7/5/2019 via email, making the request below:

In accordance with California Penal Code §832.7 (b)(1), as amended by SB 1421, I am requesting all "Brady lists," "Giglio lists," "potential impeachment disclosure lists," or any similar compiled records or lists of records of the type set forth in California Penal Code §832.7 (b)(1)(C). That is, "Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence."

In particular, the records I am seeking would provide a list of law enforcement officers in your jurisdiction whose involvement in a criminal proceeding would have to be disclosed as potentially exculpatory evidence in accordance with Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 450 U.S. 150 (1972). I am making this request for both sworn employees and non-sworn employees. At a minimum, please include the full name, serial number, and agency of employment; separate lists for each agency in your jurisdiction are fine. If possible, please also include the date of inclusion on the list and any descriptive information relating to the reason for inclusion on the list. If redactions are made, please be sure to justify how the redaction "clearly outweighs" the public interest of disclosure per Government Code §6255.

The time limit of this request is the previous 10 years, or to the maximum extent possible under your agency's records retention schedule if less than 10 years. To be clear, while SB 1421 went into effect on January 1, 2019, in accordance with the recent appellate decision in Walnut Creek Police Officers' Association v. City of Walnut Creek et al. which unsuccessfully challenged retroactivity, your agency is required by law to produce such records created prior to January 1, 2019 as well as those records created after the effective date.

Please see the response to your request below:

Under the Public Records Act and the Sunshine Ordinance, a “public record” is broadly defined to include “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency, regardless of the physical form or characteristics.” (Govt. Code §6252(e)). If the department has no records responsive to the specific request, the department has no duty to create or recreate one.

Records that contain the work product of an attorney for the People of the State of California are protected from disclosure. Cal. Govt. Code § 6254(k); Cal. Code Civ. Proc. §2018.030. The attorney work-product doctrine functions as a privilege, protecting from disclosure “[a] writing that reflects an attorney’s impressions, conclusions, opinions or legal research or theories.” Cal. Code Civ. Proc. § 2018.030(a). The attorney work-product doctrine also extends beyond records prepared for litigation purposes.

Additionally, law enforcement personnel records obtained through a *Pitchess* motion are subject to a court enforced protective order. *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531 [113 Cal. Repr. 897, 522 P.2d 305] (*Pitchess*); Pen. Code, §§ 832.7, 832.8, and Evid. Code, §§ 1043 through 1045. Separately, “official information,” which is acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, is privileged against disclosure per Cal. Evid. Code § 1040 and Cal. Govt. Code § 6254(k).

Regarding your request, our “Brady list” is not subject to disclosure pursuant to the attorney work-product doctrine and the official information privilege, and pursuant to court-issued protective orders as explained above. Additionally, we do not believe our “Brady list” constitutes a record that is subject to disclosure under Penal Code sec. 832.7(b)(2). (Our office does not keep any other databases that are responsive to your request.)

Moreover, and as important background information, our Brady list does not speak to the four categories of records that are subject to disclosure under Cal. Penal Code Section 832.7, as amended by SB 1421. Our Brady list contains the names of officers who have underlying conduct that goes to their credibility. This may include on the job acts of dishonesty and sexual assault, but, as explained below, we do not know whether any “sustained finding,” as defined in section 832.8(b) has been made by their employing agencies regarding the underlying conduct.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors have a duty to disclose “material exculpatory evidence whether the defendant makes a specific request [citation], a general request, or none at all [citation].” *In re. Brown* (1998) 17 Cal. 4th 873, 879 [72 Cal. Rptr. 2d 698, 952 P. 2d 715]. “Brady material” includes any evidence favorable to the accused—evidence that goes towards negating a defendant’s guilt, that would reduce a defendant’s potential sentence, or evidence going to the credibility of a witness. Our “Brady list” consists of the names of peace officers employed by other law enforcement agencies whose employing agency has indicated to our office that the peace officer may have unspecified Brady materials in his or her personnel file, i.e. Brady notification. The employing agency’s Brady notification to our office does not specify the scope or nature of the potential Brady materials, other than to indicate that the materials may negatively impact the individual’s credibility as a witness.

Cal. Penal Code Section 832.7, as amended by SB 1421, now creates four exceptions to the confidentiality of peace officer personnel records. For the purposes of our response, these four exceptions fall into one of two categories. There are exceptions for records of dishonesty or sexual assault that require a “sustained finding” in order for the exception to apply, and records related to the use of force or discharge of a firearm by an officer that do not require such a finding to have been made.

In terms of our “Brady list,” records related to dishonesty or sexual assault reflect the type of underlying conduct that would cause an officer’s employer to provide Brady notification to our office, thereby placing the officer’s name on our Brady list. However, Section 832.7, as amended by SB 1421, requires there to have been a “sustained finding” of on-the-job dishonesty or sexual assault in order for the records relating to the incident to be subject to disclosure. Our office has spent considerable time analyzing the language of the statute, including consulting with another city agency. A “sustained finding” under the terms of Penal Code Section 832.7 and 832.8, as amended by SB 1421, is one made by the *officer’s employing agency*. (Pen.Code sec. 832.8(b) [“sustained” finding requires, *inter alia*, the opportunity for an “administrative appeal pursuant to Section 3304 and 3304.5 of the Government Code”].) Thus, while our office possesses nonspecific Brady notifications for the officers on our Brady list, we do not possess information indicating whether any “sustained finding,” within the meaning of Penal Code secs. 832.7(b)(1)(C) and 832.8(b), has been made by the employing agency with respect to these officers. Consequently, even though our office has placed the name of a peace officer on our “Brady list,” we do not know whether that individual’s employing agency has made the “sustained finding” that Penal Code secs. 832.7 and 832.8 require for the exceptions to apply.

As for the second set of exceptions under section 832.7-- records related to the use of force or discharge of a firearm by an officer— neither types of conduct, on their own, qualify an officer for our Brady list.

As for records related to a “sustained finding” under sections 832.7(b)(1)(B) and (C), attached, please find responsive records. Please note that our disclosure obligations under these sections are limited to peace officers formerly and/or currently employed by the SFDA’s Office for whom the office has made sustained findings of dishonesty and/or sexual assault pursuant to Pen. Code sec. 832.8(b).

If you are interested in records of SFPD or other law enforcement officers under this category of exceptions, we suggest you contact the San Francisco Police Department or the appropriate employing agency to inquire as to whether any “sustained finding” has been made regarding a particular SFPD officer or officers and to obtain any records that are subject to disclosure as a result of any such finding. As previously stated, while our office possesses records relating to SFPD officers, we do not possess information indicating whether any “sustained finding,” within the meaning of Penal Code secs. 832.7(b)(1)(C) and 832.8(b), has been made with respect to these officers. In effect, this means that our office does not have information indicating that any such records in our possession are subject to disclosure under the statute.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nikesh Patel', with a long horizontal flourish extending to the right.

Nikesh Patel
Assistant District Attorney

